

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT December 7, 2006 CT-2006-010 Chantal Fortin for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	# 0008

CT-2006-10

THE COMPETITION TRIBUNAL

IN THE MATTER OF THE *COMPETITION ACT*, R.S., 1985, c. C-34;

AND IN THE MATTER OF an inquiry pursuant to subsection 10(1)(b)(ii) the *Competition Act* relating to the marketing practices of Imperial Brush Co. and Kel Kem Ltd. (c.o.b. as Imperial Manufacturing Group).

AND IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

-and-

**IMPERIAL BRUSH CO. LTD. AND KEL KEM LTD.
(c.o.b. AS IMPERIAL MANUFACTURING GROUP)**

Respondents

NOTICE OF MOTION

(Motion for Particulars and an Amended Response)

TAKE NOTE THAT the Applicant will make a motion to the Competition Tribunal (the “Tribunal”). The Applicant requests that this motion be heard by teleconference, at the earliest time convenient to the Tribunal and respective counsel.

THE MOTION IS FOR an order from the Tribunal to have the Respondents provide an Amended Response to comply with the obligations of section 5 of the *Competition Tribunal Rules* (“the Rules”), and accordingly provide the particulars, hereinafter noted, with respect to missing material facts. Furthermore, the requested particulars should be underlined.

THE MOTION IS ALSO FOR an order extending the date by which the Applicant may file a Reply to the Respondent’s Response, to a date to be determined by the Tribunal, which date would follow the determination of this motion.

THE GROUNDS FOR THE MOTION ARE:

- (a) On September 11, 2006, the Applicant filed a Notice of Application pursuant to section 3 of the Rules;
- (b) On November 24, 2006, the Respondents filed a Response pursuant to section 5 of the Rules;
- (c) The Applicant would accept that the Respondents' Response provides a concise statement of the grounds on which the Notice of Application is opposed;
- (d) The Applicant submits that the Respondents have not, however, provided a complete concise statement of the material facts on which they intend to rely to oppose the Application, this contrary to paragraph 5(3)(a) of the Rules;
- (e) Considering the Respondents' default to provide a complete statement of material facts on which they intend to rely, the Applicant has not been notified of the full case the Respondents intend to argue to oppose the Notice of Application, and therefore the Applicant submits:
 - (i) that she could be taken by surprise at the hearing; and,
 - (ii) the Tribunal does not have a complete Response and is disadvantaged with respect to its ability to administer the present proceeding, informally, expeditiously and fairly;
- (f) Accordingly, the Applicant seeks an order from this Tribunal to have the Respondents file an Amended Response that will include the hereinafter noted particulars to address missing material facts;
- (g) The Applicant relies on s.8 of the *Competition Tribunal Act*, sections 5, 68 and 72 of the *Competition Tribunal Rules*, and on Rules 181 and 183 of the *Federal Courts Rules*;
- (h) The requested particulars are as follows:

SUPERSWEEP CHIMNEY CLEANING LOG:

- (A) At paragraph 5 of the Response, the Respondents state (in part):

The SUPERSWEEP™ Chimney Cleaning Log (the “Supersweep Log”) is no longer manufactured or distributed. Imperial Brush acknowledges that representations were made on the packaging of the Supersweep Log...

...Those representations are fair representations of the performance and efficacy of the product, and are based on adequate and proper tests.

At paragraph 9 of the Response, the Respondents state:

The adequate and proper tests of the Supersweep Log referred to in the preceding paragraphs include:

- (a) Controlled tests performed by Imperial Brush under the supervision of independent engineers and consultants, and*
- (b) Experience of Imperial Brush, its consultants, and persons involved in the cleaning and maintenance of chimneys over many years.*

The Respondents have failed to provide the following material facts regarding the Supersweep Log:

- (i) the date the Respondents first started to promote the Supersweep Log;
- (ii) the date the Respondents stopped manufacturing the Supersweep Log;
- (iii) the date the Respondents stopped distributing the Supersweep Log;
- (iv) the date(s) the Respondents conducted the tests referred to above;
- (v) how the tests were conducted;
- (vi) what were the results of these tests;
- (vii) identification of the independent engineers, referred to in paragraph 9(a), who supervised the controlled tests performed by Imperial Brush and the basis for their “independence”;
- (viii) identification of the independent consultants, referred to in paragraph 9(a), who supervised the controlled tests performed by Imperial Brush and the basis for their “independence”;
- (ix) a description of the “experience of Imperial Brush”, as referred to in paragraph 9(b), and an explanation of its role within the testing related to the Supersweep Log;
- (x) identification of the consultants of Imperial Brush, referred to in paragraph 9(b), a description of their “experience”, and an explanation of the role of this experience within the testing related to the Supersweep Log;
- (xi) identification of the persons involved in the cleaning and maintenance of chimneys, as referred to in paragraph 9(b), a description of their “experience”, and an explanation of the role of

this experience within the testing related to the Supersweep Log;

(B) At paragraph 8 of the Response, the Respondents state:

The Supersweep Log consists of compressed hardwood sawdust and shavings, to which chemical substances have been added. The chemical substances are the active ingredients which perform the cleaning function. These substances can be - and are - used separately. The log is merely a delivery mechanism for the chemical substances. These substances have been in use for many years and their effectiveness has been described in technical literature.

The Respondents have failed to provide the following material facts regarding the Supersweep Log:

- (i) a precise description of the actual composition of the log, including the chemical substances in the log and the respective quantities of the components of the log;
- (ii) a precise description of the “chemical substances” referred to in paragraph 8, including for how long, and where these substances “have been in use for many years” and a statement of the position of the Respondents regarding “their effectiveness”;
- (iii) the specific technical literature that the Respondents are referring to.

KEL KEM CHIMNEY CREOSOTE CLEANER:

(C) At paragraph 10 of the Response, the Respondents state, (in part):

Kel Kem Chimney Creosote Cleaner (“Creosote Cleaner”) is a liquid product. Kel Kem acknowledges ... representations on the package...

... Those representations are a fair representation of the performance and efficacy of the product, and are based on adequate and proper tests.

At paragraph 14 of the Response, the Respondents state:

“The adequate and proper tests of the Creosote Cleaner referred to in the preceding paragraphs include:

- (a) *Controlled tests performed by Imperial Brush under the supervision of independent engineers and consultants; and*
- (b) *Experience of Imperial Brush, its consultants, and persons involved in the cleaning and maintenance of chimneys over many years.”*

The Respondents have failed to provide the following material facts regarding the Creosote Cleaner:

- (i) the date the Respondents first started to promote the Creosote Cleaner;
 - (ii) the date(s) the Respondents conducted the tests for the Creosote Cleaner referred to above;
 - (iii) how the tests were conducted;
 - (iv) what were the results of these tests;
 - (v) identification of the independent engineers, referred to in paragraph 14 (a), who supervised the controlled tests performed by Imperial Brush and the basis for their “independence”;
 - (vi) identification of the independent consultants, referred to in paragraph 14(a), who supervised the controlled tests performed by Imperial Brush and the basis for their “independence”;
 - (vii) a description of the “experience of Imperial Brush” as referred to in paragraph 14(b) and an explanation of its role within the testing related to the Creosote Cleaner;
 - (viii) identification of the consultants of Imperial Brush, referred to in paragraph 14(b), a description of their “experience”, and an explanation of the role of this experience within the testing related to the Creosote Cleaner;
 - (ix) identification of the persons involved in the cleaning and maintenance of chimneys, as referred to in paragraph 14(b), a description of their “experience”, and an explanation of the role of this experience within the testing related to the Creosote Cleaner;
- (D) At paragraph 13 of the Response, the Respondents state:

The Creosote Cleaner consists of a solution of manganese salts in water and isopropyl alcohol. The manganese salts (specifically manganese nitrate) are the active ingredients which perform the cleaning function. The water and alcohol are merely a solvent to operate as a delivery

mechanism for the manganese salts. Manganese has been in use for many years for this purpose and its effectiveness has been described in technical literature.

The Respondents have failed to provide the following material facts regarding the Creosote Cleaner:

- (i) the concentration of manganese salts (manganese nitrate) in the Creosote Cleaner;
- (ii) a statement of the position of the Respondent regarding “its effectiveness”;
- (iii) the number of years manganese has been in use for this purpose; and
- (iv) the specific technical literature that the Respondents are referring to.

KEL KEM CREOSOTE CONDITIONER:

(E) At paragraph 16 of the Response, the Respondents state, in part,:

Kel Kem acknowledges...representations made on the packaging of the Creosote Conditioner...

...Those representations are a fair representation of the performance and efficacy of the product, and are based on adequate and proper tests.

At paragraph 20 of the Response, the Respondents state:

The adequate and proper tests of the Creosote Conditioner referred to in the preceding paragraphs include:

- (a) *Controlled tests performed by Imperial Brush under the supervision of independent engineers and consultants; and*
- (b) *Experience of Imperial Brush, its consultants, and persons involved in the cleaning and maintenance of chimneys over many years.*

The Respondents have failed to provide the following material facts regarding the Creosote Cleaner:

- (i) the date the Respondents first started to promote the Creosote Conditioner;
- (ii) the date(s) the Respondents conducted the tests for the Creosote Conditioner referred to above;

- (iii) how the tests were conducted;
- (iv) what were the results of these tests;
- (v) identification of the independent engineers, referred to in paragraph 20(a), who supervised the controlled tests performed by Imperial Brush and the basis for their “independence”;
- (vi) identification of the independent consultants, referred to in paragraph 20(a), who supervised the controlled tests performed by Imperial Brush and the basis for their “independence”;
- (vii) a description of the “experience of Imperial Brush” as referred to in paragraph 20(b) and an explanation of its role within the testing related to the Creosote Conditioner;
- (viii) identification of the consultants of Imperial Brush, referred to in paragraph 20 (b), a description of their “experience”, and an explanation of the role of this experience within the testing related to the Creosote Conditioner;
- (ix) identification of the persons involved in the cleaning and maintenance of chimneys, as referred to in paragraph 20(b), a description of their “experience”, and an explanation of the role of this experience within the testing related to the Creosote Conditioner;

(F) At paragraph 15 of the Response, the Respondents state:

Kel Kem Creosote Conditioner is a powder product intended to be directly added to a fire.

At paragraph 19 of the Response, the Respondents state:

The Creosote Conditioner consists of a mixture of TSP and Bentonite Clay. These interact with the creosote and convert the sticky, semi-liquid form to a brushable form. They also restrict the build-up of creosote in chimneys. These substances has (sic) been in use for many years for this purpose and their effectiveness has been described in technical literature.

The Respondents have failed to provide the following material facts regarding the Creosote Cleaner:

- (i) the relative concentration of TSP and Bentonite Clay in the Creosote Conditioner;
- (ii) a statement of the position of the Respondents regarding “their effectiveness”;

- (iii) the number of years the substances have been in use for this purpose; and
- (iv) the specific technical literature that Respondents are referring to.

DUE DILIGENCE:

(G) At paragraph 23 of the Response, the Respondents state:

The principal business of Imperial Brush is the manufacture and distribution of wire brushes for cleaning chimneys. In late 2002, Imperial Brush acquired Kel Kem, which was in the business of manufacturing and distributing chemical products for cleaning of wood-burning appliances and chimneys, including the Creosote Cleaner, the Creosote Conditioner, and the chemical substances which were the active ingredient in the Supersweep Log. In acquiring Kel Kem and in making the representations with respect to the performance and efficacy of the products, Imperial Brush and the new management of Kel Kem relied on the advice of Mr Abe Kelly, a founder and former owner of Kel Kem and a person with extensive knowledge and practical experience with respect to these products. The Respondents Imperial Brush and Kel Kem have exercised due diligence to prevent reviewable conduct from occurring.

The Respondents have failed to provide the following material facts regarding a claim of due diligence:

- (i) the advice provided by Abe Kelly specific to each product that the Respondents relied upon;
- (ii) whether the advice was oral or in written form; and
- (iii) whether the advice was based on scientific testing.

PROCEDURAL REQUEST

Given the nature of this motion, the Applicant requests that the Tribunal grant an extension of the time by which she may file a Reply to the Response filed by the Respondents, to a date following the determination of this Motion, as the content of the information to which the Applicant may reply could be materially effected by the outcome of this motion.

THE FOLLOWING DOCUMENTARY EVIDENCE is filed in support of this motion:

The Affidavit of Ms. Anna Proestakis, dated December ____, 2006.

The Applicant's Memorandum

Dated at Ottawa, Ontario this ____ day of December, 2006.

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